

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7261

To be argued by
JOHN T. REDMOND

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

LILLIAN V. CANNON, individually and on behalf of all
other persons similarly situated,

Plaintiff-Appellant,

-against-

THE UNITED CHURCH BOARD FOR HOMELAND MIN-
ISTRIES, and REV. OTIS YOUNG, REV. SERGE
HUMMON, REV. HOWARD SPRAGG, and MR. WILLIAM
NELSON, individually and as Officers of UNITED
CHURCH BOARD FOR HOMELAND MINISTRIES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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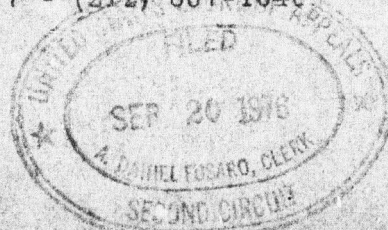


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LILLIAN V. CANNON, individually and :
on behalf of all other persons :
similarly situated, :

Plaintiff-Appellant, :

-against- :

76-7261

THE UNITED CHURCH BOARD FOR HOMELAND :
MINISTRIES, and REV. OTIS YOUNG, REV. :
SERGE HUMMON, REV. HOWARD SPRAGG, and :
MR. WILLIAM NELSON, individually :
and as Officers of UNITED CHURCH BOARD :
FOR HOMELAND MINISTRIES, :

Defendants-Appellees. :

- - - - - x

BRIEF FOR DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

It should be noted at the outset that the only defendants who appeared in this action are the United Church Board for Homeland Ministries, Rev. Serge Hummon and Rev. Howard Spragg. The latter two defendants have been sued individually and as Officers of the United Church Board for Homeland Ministries. Neither the defendant Rev. Otis Young nor Mr. William Nelson appear to have been served with process.

STATEMENT OF THE CASE

The defendants accept the statement of the case contained in the plaintiff's brief. For purposes of clarification,

however, we believe that the defendants should be more fully identified.

The United Church Board for Homeland Ministries is a New York Not-for-Profit religious and charitable corporation. It is the recognized instrumentality of the United Church of Christ for furthering its Christian mission in the United States. The United Church of Christ is a religious fellowship or denomination of approximately 6,600 local churches, having a combined membership of roughly 1,900,000 members. The fellowship was formed in 1957 through a union of the Evangelical and Reformed Church and the Congregational Christian Churches, both of which bodies have long and honored traditions in this country (11a-12a).*

The defendant Howard E. Spragg is the Executive Vice-President of the United Church Board for Homeland Ministries (11a).

THE ISSUES PRESENTED

1. Is the time limitation for filing with the EEOC contained in 42 USC § 2000e-5(e) a jurisdictional prerequisite to suit in the Federal Courts?
2. Was this action commenced within the applicable time limitation?

* Unless otherwise indicated, figures in parentheses refer to pages of the Appendix.

3. May plaintiff's complaint be sustained on the ground that it states continuing violations against members of a class?

POINT I

THE COURT LACKS JURISDICTION OF THE
SUBJECT MATTER BECAUSE OF THE UNTIMELY
FILING OF THE CHARGES WITH THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

42 USC, § 2000e-5(e), provides in pertinent part
as follows:

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

At the time of the actions complained of the statute required that charges originating in deferral states such as New York be filed within 210 days following the occurrences of the unlaw-

ful act or within 30 days after receiving notice that the state or local agency had terminated its proceeding, whichever is earlier. On March 24, 1972, prior to the filing of charges with the EEOC by the plaintiff, the act was amended to its present form and the 210 day limitation was increased to 300 days. It matters not which limitation is applied to the facts in this case, because the plaintiff is barred in either event.

The United States Supreme Court in Alexander v. Gardner-Denver, 415 U.S. 36 (1974) has held, if not expressly, then certainly by clear implication that the time requirements relating to filing charges with the EEOC were jurisdictional prerequisites to suit in the Federal Courts. There, in the face of a claim that the plaintiff could not maintain an action in the District Court because he had already sought relief through an arbitration proceeding, the Court held that a victim of discrimination was not only protected by Title VII but was free to pursue all available remedies including those provided by state and local statutes as well as private grievance and arbitration procedures and that all such remedies could be pursued concurrently. But more importantly for our purposes, the Court gave a clear indication of its view that timely filing under Title VII was a jurisdictional prerequisite to the institution of a lawsuit, in the following observation:

"Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U.S.C. § 2000e-5(b), (e), and (f). See McDonnell Douglas Corp. v. Green, supra, 411 U.S., at 798, 93 S.Ct., at 1822."

In Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) the court affirmed the dismissal of a complaint in a Title VII civil rights action and stated:

"The District Court dismissed Olson's employment discrimination allegations as not timely filed with the EEOC, holding that the filing of a charge with the EEOC within the time limits of § 2000e-5(e) is a jurisdictional prerequisite to commencement of a court action. We agree that timely filing of an EEOC charge is a prerequisite to court action. See Moore v. Sunbeam Corp., 459 F.2d 811, 821 n. 26 (7th Cir. 1972); Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968; cf. Pacific Maritime Association v. Quinn, 491 F.2d Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1014-15 n.6 (5th Cir. 1971)."

In Guy v. Robbins & Myers, Inc., 525 F.2d 124 (6th Cir. 1975) the Court, relying upon Alexander v. Gardner-Denver, 415 U.S. 36 (1974), held that the statutory time limitation within which a charge must be filed with the EEOC is a jurisdictional prerequisite to the plaintiff's maintenance of an

action in the Federal Court based upon the same charge. In so doing, the Court affirmed the dismissal of the complaint on the ground that the plaintiff had not made a timely filing of the charge with the EEOC. Significantly, the Court made the following observation concerning the Supreme Court's opinion in Alexander v. Gardner-Denver, supra:

"This is a clear pronouncement that the 90 day limitation period in the Act for filing a charge with EEOC is a jurisdictional prerequisite 'that an individual must satisfy before he is entitled to institute a lawsuit'".

The Ninth Circuit in Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975) has also adopted the view that timely filing of charges with the EEOC is a jurisdictional prerequisite to commencement of a court action under the statute.

Similarly, in Hecht v. Cooperative For American Relief Everywhere, Inc., 351 F. Supp. 305 (S.D.N.Y. 1972), Judge Lasker dismissed certain individual causes of action contained in the complaint on the ground that charges had not been filed with the EEOC within the then applicable 210 day period. The Court observed:

"The fact remains, however, that the statute requires that for a plaintiff to sue in federal court, he must bring charges before the EEOC within 210 days of the discriminatory act. Thus, on an individual basis, if a charge is barred before the EEOC by the 210 day statute of limitations, it is equally barred as the basis of a judicial action, and the period of limitations for administrative proceedings prevents federal suits as effectively as would a statute of limita-

tions specifically applicable to them. This is in keeping with the statutory scheme that the district courts can act only after the EEOC has investigated and sought voluntary compliance and that the EEOC should only be required to investigate fresh discriminatory acts."

Failure to comply with other procedural time requirements of Title VII have also been held to require dismissal of the complaint; Brown v. GSA, ___ U.S. ___, 44 U.S.L.W. 4704 (June 1, 1976) in which the United States Supreme Court affirmed the dismissal of a complaint because the plaintiff had not met the filing requirements for commencement of an action applicable under the Act to Federal employees; DeMatteis v. Eastman Kodak Company, 511 F.2d 306 (2nd Cir. 1975) in which the Court held that commencement of the action within the 90 day statutory period is a jurisdictional fact; Goodman v. City Products Corp., 425 F.2d 702 (6th Cir. 1970), in which failure by one day to comply with the 30 day filing requirement was held to be fatally defective.

In the instant case, the unlawful employment practices as to which the plaintiff complains necessarily occurred no later than December 31, 1971, the date upon which her employment with the Board was terminated (5a, 16a). The proceedings before the City Commission were finally concluded on October 2, 1973 and November 1, 1973 was the thirtieth day subsequent to the conclusion of such proceeding (19a-20a). The 300 day period following plaintiff's discharge from employment ended on October 26,

1972 which is earlier than November 1, 1973 and is therefore the day designated by the Act as the date upon which a charge should have been filed with the EEOC in order to be timely. However, plaintiff did not file her charge until January 3, 1973, 369 days after her discharge from employment and 69 days after October 26, 1972, the last day upon which a charge could have been timely filed.

The complaint, in an effort to avoid the impact of the time limitations contained in the statute, alleges that the plaintiff was unaware of the jurisdictional requirements of the statute and, therefore, did not or could not comply with them (7a). We submit that timely filing with the EEOC is jurisdictional under the cases heretofore cited and that no exceptions are contained in the Act with respect to such requirements. To permit the plaintiff to control the running of the statute of limitations through a claim of ignorance would create a mischievous exception to the jurisdictional requirement which Congress has not seen fit to provide. In Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. 1975) the Court refused to consider a civil rights action commenced one day after the expiration of the 90 day suit period, despite a claim that the plaintiff had acted diligently but in ignorance of his rights. The reasons for dismissal here are equally compelling, particularly in view of the fact that the plaintiff has had a proceeding

on the merits before the New York City Commission on Human Rights, whose determination is to be accorded substantial weight under § 2000e-5(b) of the Act.

POINT II

THE LATE FILING OF CHARGES WITH THE EEOC CANNOT BE WAIVED OR EXCUSED

Plaintiff contends that she has substantially complied with the filing requirements of § 2000e-5(e) of the Act and should therefore be permitted to pursue this action. The plain fact is that late compliance is no compliance, substantial or otherwise.

Plaintiff posits her argument on two broad grounds. The first of these is the contention that equity requires a liberal construction of the Act, including its provisions regarding time limitations in order to insure that aggrieved plaintiffs will not be denied their day in court. To this end, plaintiff would have this Court ignore plainly expressed Congressional intent, under the rubric of liberal interpretation, despite the fact that none of the cases relied upon by her have construed the statute in so cavalier a manner, nor have they gone so far.

This Court's recent decision in Egelston v. State University, 535 F.2d 752 (2d Cir. 1976) is instructive in this regard. There, the District Court had dismissed the complaint on the ground that the plaintiff had not made a prior

timely filing with the EEOC. This Court did not ignore the applicable time limitation involved in that case, but liberally construed the statute in that, as between two dates, each of which was advanced by one or the other of the contending parties as the date upon which the time to file charges with the EEOC had commenced to run, the Court, for valid reasons, chose the date more favorable to the plaintiff.

It appears that the plaintiff Judy Egelston had been hired by the State University College at Geneseo as an assistant professor in September, 1970. She was notified on May 15, 1972, that the administration had decided not to extend her contract beyond its expiration date in June, 1973. Nevertheless, she continued to teach at Geneseo until her contract expired.

On January 24, 1973, several months prior to the expiration of her contract, Egelston filed a charge with the Office of Federal Contract Compliance. After having secured a right to sue notice from the EEOC, she brought an action against Geneseo in accordance with the provision of 42 USC, § 2000e-5(f). The District Court dismissed the complaint stating that the plaintiff had not complied with the 180 day filing requirement contained in the Act. Apparently, the District Court computed the time to file as having commenced when Dr. Egelston was notified in May, 1972, of the administration's decision not to extend her contract. This Court reversed the decision, holding that the statute had not commenced to run in May of 1972, but rather in

June of 1973 when her discharge was complete. Moreover, the Court pointed out that the complaint contained allegations concerning several other acts of discrimination as to which the January, 1973 filing was timely.

The instant case can readily be distinguished from the Egelston case because there is no contention here, and indeed there can be none, that the plaintiff's rights accrued on any date other than December 31, 1971 when her employment was terminated. Consequently, December 31, 1971 must be used as the starting point in computing the 300 day period within which a charge should have been filed with the EEOC. It is undisputed that the charge was not filed within that period.

It should be noted that the companion case, Noble v. University of Rochester, 535 F.2d 756 (2d Cir. 1976), decided by this Court on the same day as the Egelston case, may be distinguished from the instant case in the same manner as Egelston.

Plaintiff further contends that equity will intervene in a proper case to prevent or to cure a default of the nature committed by the plaintiff when extenuating circumstances exist which would justify equitable intervention. Without exception, the cases relied on by the plaintiff in this regard fall into a pattern in which an unwitting victim was misled, to his detriment, by the actions of employees of the administrative agency involved or in which the action of some third party

adversely affected his right in some substantial way. It would seem that these decisions approach the filing requirements of Title VII not as jurisdictional prerequisites but as a statute of limitations problem and thus subject to equitable considerations. Even if one assumes the validity of a traditional statute of limitations approach to Title VII's filing requirements, there has been no showing in this case of any extenuating or compelling circumstance that would warrant an extension or tolling of such requirements.

A review of some of the typical cases relied upon by plaintiff to support this contention clearly illustrates the point. Thus, in Gates v. Georgia Pacific Corp., 492 F.2d 292 (C.A. 9 1975), the complaint had been timely filed with the EEOC, but the untimely filing of a court action was occasioned by the failure of the Commission to comply with its own regulations regarding the giving of notice of right to sue.

Similarly, in Taylor v. Pacific Intermountain Express Co., 394 F.Supp. 72 (ND Ill. 1975), the plaintiff's failure to commence his action 90 days following the receipt of a "failure to conciliate" letter was excused where the Commission had misinformed the plaintiff that the receipt of a "right to sue" letter would be necessary before suit could be brought.

In Franks v. Bowman, 495 F.2d 398 (C.A. 5 1974), the Commission's "right to sue" letter was lost by the plaintiff's nephew and the Court held that commencement of the action within the 30 day period following the receipt of a second such letter was sufficient compliance.

The papers submitted by the plaintiff in opposition to the motion to dismiss will be searched in vain for any comparable circumstance which could be relied upon as justification for having filed her charge with the EEOC after the permissible period had expired.

The second ground upon which plaintiff seeks to avoid the impact of the EEOC filing requirement is the contention that by the timely filing of her claim with the New York City Commission on Human Rights the period within which a charge must be filed with the EEOC as established by § 2000e-5(e) of the Act has been tolled. This is a curious argument to make in light of the clearly expressed Congressional intent that filing with the EEOC must be made within 300 days of the act complained of, specifically in cases where a complaint has first been made with a local or state human rights agency. Nevertheless, plaintiff attempts to analogize her situation to those presented in such cases as Sanchez v. Trans World Airlines, 499 F.2d 1107 (C.A. 9 1974) and Malone v. North American Rockwell Corporation, 457 F.2d 779 (C.A. 9 1972).

These cases appear to stand only for the proposition that the filing requirement prescribed by the Act is tolled during the period in which the plaintiff has sought to adjust a claim covered by Title VII by means of a private settlement pursuant to the terms of a collective bargaining agreement or by arbitration.

This contention would appear to have no application to the facts in the instant case because Congress has specifically provided a 300 day filing requirement in cases such as this when the plaintiff has initially sought relief before a state or local agency. Congress has created no exceptions in such instances. Furthermore, the contention would appear to be of questionable validity even in those cases where resort is first had to private grievance machinery.

The claim that the filing of a grievance pursuant to a collective bargaining agreement tolls the time requirement for filing with the EEOC was squarely before the court in Guy v. Robbins & Myers, Inc., supra, and the Sixth Circuit held that it would not. There, the District Court had granted the defendants' motion to dismiss plaintiff's Title VII claim that she had been discharged on account of her race, stating that she had not met the requirement of filing a charge with the EEOC within 90 days from the date of her discharge. She contended that the 90 day requirement of the Act was tolled during the pendency of a grievance procedure which she had filed with her employer under the provisions of a collective bargaining agreement. The court observed that if the plaintiff's reasoning were followed, the exercise of rights under Title VII could be delayed indefinitely by many years while an individual is pursuing other remedies. Such a claim it was said is in conflict with Congressional intent made

manifest by the short periods of time provided in the Act as prerequisites for the exercise of rights under it. Although the Court stated that it construed the United States Supreme Court's decision in Alexander v. Gardner-Denver, supra, as a clear indication that timely filing with the EEOC is a jurisdictional prerequisite and controlling in that regard, it made an additional pertinent observation as follows:

"The limitation in Title VII is more than a mere statute of limitations. The Act creates a right and liability which did not exist at common law and prescribes the remedy. The remedy is an integral part of the right and its requirements must be strictly followed. If they are not, the right ends."

The decision of the Sixth Circuit in Guy v. Robbins & Myers, Inc., supra, would appear to be a more desirable result than those reached in the cases relied upon by the plaintiff in support of her contention that the statute should be tolled. This is particularly so in view of the Supreme Court decision in Alexander v. Gardner-Denver, supra, to the effect that a plaintiff may concurrently pursue different forms of relief in different forums. This being so, there is no need to toll any filing requirements.

Even assuming arguendo that there is some justification for tolling the time requirements in those cases where an aggrieved plaintiff has sought private settlement of the discrimination charges through grievance or arbitration procedures, similar treatment cannot be afforded claims which are filed untimely with the EEOC, although timely filed in the first instance

with a local or state agency such as the New York City Commission on Human Rights because Title VII has established a specific period of limitation with regard to such claims. For this Court to hold otherwise would be to ignore clearly expressed Congressional intent.

In summary, plaintiff should be precluded from maintaining this action because:

1. She has not complied with the jurisdictional prerequisite of timely filing with the EEOC. This would appear to be in accordance with the decision in Alexander v. Gardner-Denver, 415 U.S. 36 (1974) and the decisions of the Sixth Circuit (Guy v. Robbins & Myers, Inc.), the Eighth Circuit (Olson v. Rembrandt Printing Co.) and the Ninth Circuit (Collins v. United Air Lines, Inc.).

2. The requirement for timely filing with the EEOC prior to the commencement of a civil action cannot be tolled in the face of a clearly expressed Congressional intent with respect to claims first filed with a local or state agency.

3. Even if the doctrine of equitable intervention is applicable, plaintiff has failed to show any compelling or extenuating circumstance which would warrant its application here.

POINT III

THIS ACTION WAS NOT COMMENCED
WITHIN THE NINETY DAY PERIOD
PROVIDED BY TITLE VII

This action was commenced on October 10, 1975 (1a). In his decision below, Judge Gagliardi stated that the complaint should be dismissed for the additional reason that the action had not been commenced within 90 days following notification on June 23, 1975 to the plaintiff by the EEOC that her charge had been dismissed. In so holding, the Court below cited this Court's decision in DeMatteis v. Eastman Kodak Company, 511 F.2d 306 (2d Cir. Feb. 1975), modified 520 F.2d 409 (July 1975), in which it was said that commencement of an action within the applicable 90 day statutory limitation was a jurisdictional fact.

The EEOC letter dated June 23, 1975 which informed the plaintiff of the dismissal of her charges also advised her that if she objected to the dismissal she could contest the objection in the United States District Court and for such a purpose she should request a "Notice of Right-to-Sue" from the Commission (23a). This she apparently did, for a "Notice of Right-to-Sue" was issued by the Commission on July 15, 1975 advising that an action must be commenced within ninety days from its receipt (24a). It must be noted that the pattern just described is a repitition of what had occurred in the DeMatteis

case and which occasioned the modification of this Court's initial decision. The decision in DeMatteis was modified so as to exclude the plaintiff there from its application but to be applicable to actions commenced after May 7, 1975.

In the face of these facts, the District Court must surely have construed the time limitation applicable to the commencement of civil actions under Title VII after May 7, 1975 as a strict jurisdictional requirement not subject to variation by equitable intervention. We suggest that such an interpretation is in keeping with this Court's holding in DeMatteis v. Eastman Kodak, supra. In DeMatteis the Court condemned the unwarranted extension of Federal Court jurisdiction in civil rights actions brought about by the Commission's practice of issuing a letter advising of dismissal and permitting the complainant to later obtain a "Right-to-Sue" letter. Such a practice has no sanction in the statute and has the pernicious effect of permitting a plaintiff to delay indefinitely the commencement of an action under Title VII by the simple expedient of delaying a request for a "Right-to-Sue" letter.

Genovese v. Shell Oil Company, 488 F.2d 84 (5th Cir. 1973), Archuleta v. Duffy's, Inc., 471 F.2d 23 (10th Cir. 1973), Harris v. National Tea Company, 454 F.2d 357 (7th Cir. 1968) and Goodman v. City Products Corp., 425 F.2d 702 (6th Cir. 1970) have also recognized that the requirement necessitating the commencement of an action within the time specified in the statute is jurisdictional.

POINT IV

CONCLUSORY ALLEGATIONS OF CLASS
CLAIMS CANNOT SAVE PLAINTIFF'S
CAUSE OF ACTION

Plaintiff has sought to bring herself within the principle that continuing violations of the Act will serve to extend the period within which claims may be timely filed with the EEOC. While such a claim has been recognized by the Courts in appropriate circumstances, it can have no validity here.

Initially, it can be observed that the discriminatory acts as to which the plaintiff complains individually occurred during her employment and necessarily terminated at the time of her discharge on December 31, 1971. Indeed, the complaint itself alleges that the discrimination against plaintiff culminated in her discharge (6a, Comp. pars. 25, 26 & 27). Under such circumstances it has been held that termination of employment either through discharge or resignation is not a continuing violation. Employment discrimination is put to rest because the individual is no longer an employee. Olson v. Rembrandt, supra, Collins v. United Air Lines, supra, Phillips v. Columbia Gas, 347 F. Supp. 533 (S.D. West Virginia 1972). Thus, whatever rights plaintiff may have had under the Act accrued on the date of her discharge, December 31, 1971, and the applicable filing period must be computed from that date.

As to the class claims, the District Court held quite properly that the complaint contained mere conclusory

allegations regarding a general practice of race discrimination but lacked any specific allegations about instances of discrimination affecting black employees other than the plaintiff (30a). Moreover, the record in this case will show that the affidavits submitted by plaintiff in opposition to defendants' motion to dismiss and in support of plaintiff's cross-motion to have the action certified as a class action are wholly barren of any facts relating to discriminatory practices against black employees of the defendant Church Board. Accordingly, we must agree with the District Court's observation:

"In this case, on the other hand, the plaintiff appears basically to complain about her individual dismissal. Although the complaint contains conclusory allegations about a general practice of race discrimination by the church and purports to seek representation of the class, nowhere in the complaint are there set forth any specific allegations about instances of discrimination affecting black employees of the Church other than the plaintiff. Furthermore, there is serious question as to whether this case would even satisfy the requirements of Rule 23, Fed. R. Civ. P. for a class action. * * * To permit any plaintiff who has been dismissed from a job by an employer to avoid the statutory period of limitations by the mere allegation of a class action and continuing violation of the statute would render any limitation of the period meaningless."

CONCLUSION

For all of the foregoing reasons, the judgment and order below should be affirmed in all respects.

Respectfully submitted,

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